Nor Azlina bt Abdul Aziz v Expert Project Management Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCVC)(W)-1941–11 OF 2015
DAVID WONG, KAMARDIN HASHIM AND HARMINDAR SINGH JJCA
27 FEBRUARY 2017

Contract — Termination — Automatic termination — Joint venture agreement between parties provided for agreement to automatically terminate if conditions precedent not fulfilled within a year — Party required to fulfill conditions precedent failed to do so within stipulated time frame despite being granted extension of time — Whether contract automatically came to an end without need for any notice of termination

The respondent housing developer entered into a joint venture agreement ('JVA') with the appellant land owner to construct 13 bungalows on the land. The JVA contained a conditions precedent clause ('cl 5') which stated that if the respondent did not obtain all approvals, consents, permits and licences required by the relevant authorities for the development of the land within one year of the date of the agreement ('the conditional period'), the JVA would automatically terminate. As required under the JVA, the respondent paid the appellant a refundable deposit of RM200,000 ('the deposit') which she was entitled to forfeit if the respondent defaulted. The respondent obtained the planning permission and/or development order for the land within the conditional period but approvals for the conversion and subdivision of the land and for the registration of separate titles for the lots were only obtained after the expiry of that period. The appellant had allowed the respondent a seven-month extension of time after expiry of the conditional period to fulfill the conditions precedent and when it still was not able to do so, she had proposed a further two months' extension provided new terms and conditions were agreed to. The respondent refused to agree and notified the appellant that it would suspend all works under the JVA until she agreed to proceed with the agreement as per its original terms and conditions. The appellant sued the respondent in the High Court for, inter alia, declarations that it had breached the JVA; that she was entitled to terminate the agreement, or, alternatively, that the JVA had automatically terminated; and that she was entitled to forfeit the deposit. The appellant also sought an order for the forthwith return of vacant possession of the land and an order for damages to be assessed. The respondent counterclaimed for monies it had expended under the JVA and sought general and special damages. The High Court dismissed the appellant's claim and granted the respondent RM1,194,257.02 in special damages and RM2m in

general damages and costs. The court also ordered the deposit to be refunded to the respondent and vacant possession of the land to be returned to the appellant. The High Court found the JVA had not automatically terminated because the conduct of the parties showed that although the conditional period had expired, the appellant had granted the respondent further time to fulfill the conditions precedent. The High Court held that it was the appellant who had unilaterally terminated the JVA by not wanting to proceed with the contract and preventing the respondent from carrying out its obligations. In the instant appeal against the High Court's decision, the respondent argued that the appellant never exercised her right under cl 5 to terminate the JVA but, instead, had allowed time to be at large by granting the respondent extension of time to fulfill the conditions precedent. The respondent also said it was the appellant who breached the JVA when she wanted to vary the original terms and conditions of the agreement.

Held, allowing the appeal, setting aside the decision of the High Court, declaring that the JVA had been automatically terminated, dismissing the counterclaim and ordering the deposit to be refunded to the respondent and vacant possession of the land to be returned to the appellant forthwith:

(1) The parties had agreed that the conditions precedent as set out in the JVA had to be complied with within the time stipulated for the contract to remain valid and binding. Since there was a failure to do so, the contract was automatically discharged. It could not also be the case that time was no longer of the essence and was at large as the time period itself was a condition precedent for the contract to be binding (see para 28).

(2) In view of the automatic termination clause in cl 5 of the JVA, there was no longer a requirement for any notice of termination. Once the conditions precedent were not fulfilled within the stipulated period or any extended period, the agreement automatically came to an end. So when the appellant's solicitors sent the letter of 22 April 2014 giving notice that the conditions precedent had not been complied with and offering a further extension with new conditions, which was not accepted by the respondent, the contract came to an end then and there by virtue of cl 5 of the JVA. There was no ambiguity in what the parties had signed up for. The court was duty-bound to uphold what the parties had bargained for in the JVA and, more particularly, in cl 5 (see para 31).

(3) The trial judge erred in finding that time was no longer of the essence and was at large. The correct position was that once the conditions precedent were not fulfilled within the stipulated period, the contract became null and void and the parties were then relieved from performing the rest of their obligations. Contrary to the finding of the trial judge, there was no breach by the appellant. It was the respondent which had failed to fulfill its promise to obtain all the approvals as stated in cl 5, which were

stipulated to be conditions precedent which were to be performed by the unconditional date which included any agreed period of extension (see para 32).

[Bahasa Malaysia summary

Responden pemaju perumahan telah memasuki perjanjian usahasama ('PUS') dengan perayu pemilik tanah untuk membina 13 banglo atas tanah. PUS tersebut mengandungi fasal prasyarat ('fasal 5') yang menyatakan jika responden tidak memperolehi kesemua kelulusan, persetujuan, permit dan lesen yang dikehendaki oleh pihak berkuasa berkaitan untuk pembangunan tanah itu dalam tempoh satu tahun dari tarikh perjanjian ('tempoh bersyarat'), PUS itu akan tamat secara automatik. Sepertimana dikehendaki di bawah PUS itu, responden telah membayar perayu deposit yang boleh dikembalikan berjumlah RM200,000 ('deposit tersebut') yang mana dia berhak untuk rampas jika responden gagal. Responden telah memperoleh kebenaran perancangan dan/atau perintah pembangunan untuk tanah tersebut dalam tempoh percubaan tetapi kelulusan untuk penukaran dan pembahagian tanah tersebut dan untuk pendaftaran hak milik berasingan bagi lot-lot itu hanya diperoleh selepas tamat tempoh tersebut. Perayu telah membenarkan responden lajutan masa selama tujuh bulan selepas tamat tempoh untuk tempoh percubaan tersebut bagi memenuhi prasyarat tersebut dan apabila ia masih tidak dapat berbuat sedemikian, dia telah mencadangkan lanjutan dua bulan tambahan dengan syarat terma dan syarat baru dipersetujui. Responden enggan untuk bersetuju dan memberitahu perayu bahawa ia akan menggantung semua kerja di bawah PUS tersebut sehingga dia bersetuju untuk meneruskan dengan perjanjian tersebut sepertimana terma dan syarat asalnya. Perayu telah menyaman responden di Mahkamah Tinggi untuk, antara lain, deklarasi bahawa ia telah melanggar PUS tersebut; bahawa dia berhak untuk menamatkan perjanjian tersebut, atau secara alternatif, bahawa PUS tersebut telah ditamatkan secara automatik; dan bahawa dia berhak merampas deposit tersebut. Perayu juga memohon satu perintah untuk memperoleh kembali milikan kosong tanah tersebut dan perintah untuk ganti rugi ditaksir. Responden menuntut balas untuk wang yang telah dibelanjakannya di bawah PUS tersebut dan memohon ganti rugi am dan khas. Mahkamah Tinggi menolak tuntutan perayu dan memberikan responden RM1,194,257.02 sebagai ganti rugi khas dan RM2 juta sebagai ganti rugi am dan kos. Mahkamah juga memerintahkan deposit dikembalikan kepada responden dan milikan kosong tanah dikembalikan kepada perayu. Mahkamah Tinggi mendapati PUS tersebut tidak ditamatkan secara automatik kerana perlakuan pihak-pihak menunjukkan bahawa meskipun tempoh percubaan telah luput, perayu telah memberikan responden masa lanjutan bagi memenuhi prasyarat itu. Mahkamah Tinggi memutuskan bahawa ia adalah perayu yang secara unilateral menamatkan PUS tersebut kerana tidak ingin meneruskan kontrak itu dan menghalang responden daripada menjalankan obligasinya. Dalam rayuan ini terhadap keputusan

Mahkamah Tinggi, responden berhujah bahawa perayu tidak melaksanakan haknya di bawah fasal 5 untuk menamatkan PUS tersebut tetapi, sebaliknya, telah membenarkan masa lebih bagi memberikan responden lanjutan masa untuk memenuhi prasyarat. Responden juga menyatakan bahawa ia adalah perayu yang telah melanggar PUS tersebut apabila dia ingin mengubah terma dan syarat asal perjanjian tersebut.

Diputuskan, membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi, mengisytiharkan bahawa PUS tersebut telah ditamatkan secara automatik, menolak tuntutan balas dan memerintahkan deposit dikembalikan kepada responden dan milikan kosong tanah dikembalikan kepada perayu:

(1) Pihak-pihak telah bersetuju bahawa prasyarat sepertimana ditetapikan dalam PUS tersebut hendaklah dipatuhi dalam tempoh yang ditetapkan agar kontrak kekal sah dan mengikat. Oleh kerana gagal berbuat sedemikian, kontrak itu tamat secara automatik. Ia juga bukan keadaan di mana masa bukan lagi penting dan dilanjutkan kerana tempoh masa itu sendiri adalah prasyarat untuk kontrak itu mengikat (lihat perenggan 28).

(2) Berdasarkan fasal penamatan automatik dalam fasal 5 PUS tersebut, tiada lagi keperluan untuk apa-apa notis penamatan. Setelah prasyarat tidak dipenuhi dalam tempoh yang ditetapkan atau apa-apa tempoh lanjutan, perjanjian secara automatik akan berakhir. Oleh itu apabila peguamcara perayu menghantar surat 22 April 2014 memberikan notis bahawa prasyarat tidak dipatuhi dan menawarkan lanjutan lagi dengan syarat baru, yang tidak diterima oleh responden, kontrak itu berakhir di situ dan menurut fasal 5 PUS tersebut. Tiada ketaksaan dalam apa yang ditandatangani oleh pihak-pihak mahkamah terikat dengan kewajipan untuk menegakkan apa yang ditawarkan kepada pihak-pihak dalam PUS tersebut dan, lebih khusus, fasal 5 (lihat perenggan 31).

(3) Hakim perbicaraan terkhilaf dalam mendapati bahawa masa bukan lagi penting dan dilanjutkan. Kedudukan sebenar adalah apabila prasyarat tidak dipenuhi dalam tempoh yang ditetapkan, kontrak tersebut menjadi terbatal dan tidak sah dan pihak-pihak dengan itu terlepas daripada melaksanakan obligasi mereka selanjutnya. Berbanding dengan penemuan hakim perbicaraan, tidak terdapat pelanggaran oleh perayu. Ia adalah responden yang telah gagal untuk memenuhi janjinya untuk memperoleh kesemua kelulusan sepertimana dinyatakan dalam fasal 5, yang menyatakan prasyarat hendaklah dilaksanakan pada atau sebelum tarikh tanpa syarat yang termasuk mana-mana tempoh lanjutan yang dipersetujui (lihat perenggan 32).]

Notes

For cases on termination in general, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 7045–7115.

Cases referred to

Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597; [2010] 1 CLJ 269, FC (refd)

Choo Kok Beng v Choo Kok Hoe & Ors [1984] 2 MLJ 165, PC (refd)

Director of Forests & Anor v Mau Kam Tong & Mau Kim Siong (the executors of the estate of Mau Ming, deceased) & Anor and another appeal [2010] 3 MLJ 509, CA (refd)

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441, FC (refd)

First Count Sdn Bhd v Wang Yew Logging & Plantation Sdn Bhd [2013] 4 MLJ 693, CA (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)

Hock Huat Iron Foundry (suing as a firm) v Naga Tembaga Sdn Bhd [1999] 1 MLJ 65; [1999] 1 CLJ 89, CA (refd)

Langkawi R & D Academy Sdn Bhd v Ketua Setiausaha, Kementerian Pertahanan Malaysia & Ors [2012] 5 MLJ 662, CA (refd)

Lee Ing Chin @ Lee Teck Seng v Gan Yook Chin & Anor [2003] 2 MLJ 97, CA (refd)

Lee Nyan Hon & Bros Sdn Bhd v Metro Charm Sdn Bhd [2009] 6 MLJ 1, CA (refd)

Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd [2012] 4 MLJ 149, CA (refd)

Raja Lob Sharuddin bin Raja Ahmad Terzali & Ors v Sri Seltra Sendirian Bhd [2008] 2 MLJ 87, CA (refd)

Sim Chio Huat v Wong Ted Fui [1983] 1 MLJ 151, FC (refd)

Appeal from: Civil Suit No 22 NCVC-261–05 of 2014 (High Court, Kuala Lumpur)

M Vinoben (Norazmi Norazman with him) (Azmi Fadzly Maha & Sim) for the appellant.

Harpal Singh Grewal (Abd Shukor Ahmad, Khu Kim Guat and Reny Rao with him) (Shukor Baljit & Partners) for the respondent.

Harmindar Singh JCA:

[1] This is an appeal against the decision of the High Court at Kuala Lumpur delivered on 30 October 2015 after a full trial. The High Court had dismissed the appellant's claim and allowed the respondent's counterclaim with special damages in the sum of RM1,194,257.02, general damages in the sum of RM2,000,000, refund of a deposit of RM200,000 and costs of RM30,000.

[2] This appeal was heard on 14 September 2016. After hearing the parties and taking into consideration the written submissions, we allowed the appeal and set aside the order of the High Court. Our reasons for doing so now follow. For convenience the parties will be referred to as they were in the High Court.

SALIENT FACTS

[3] The salient facts giving rise to the civil suit can be stated as follows. The plaintiff is the registered owner of all that land held under GM 4430, Lot No 13144, Tempat Perimbun, Mukim and District of Hulu Langat, State of Selangor ('the said land'). The defendant is a private limited company and its principal business is that of a housing developer.

[4] The plaintiff and the defendant entered into a joint venture agreement known as the heads of agreement dated 11 September 2012 ('the agreement'). The salient terms and conditions of the agreement that concern the dispute in this appeal were as follows:

(a) the defendant was to construct on the said land three bungalows on the plaintiff's Lots, identified as Lots 1, 2 and 5 ('the plaintiff's lots') and also a shared lot, that is, on Lot 3 ('the shared lot') within the stipulated period. The remaining nine lots are to be developed by the defendant and known as the company's lots ('the defendant's lots). The defendant was to carry out the development of the said land comprising 13 bungalows with infrastructure at the cost and expense of the defendant;

(b) cl 5 provided for the conditions precedent, that within one year from date of the agreement (11 September 2012), known as the 'conditional period' with 11 September 2013 being known as the 'unconditional date', the defendant shall obtain all the approvals, consents, permits and licences required by the relevant authorities for development of the said land pertaining to the following:

  (i) planning permission;

  (ii) building plan approval for the plaintiff's lots;

  (iii) conversion of the land from agricultural land to residential land; and

  (iv) subdivision of the land.

(c) cl 5 also provided that if the defendant fails to comply with the requirements mentioned above, the agreement shall automatically be terminated and neither party shall have any claim against the other (save and except for any antecedent breach);

(d) cl 6(i) provided that the plaintiff is entitled to a refundable deposit of RM200,000, which deposit shall be forfeited in the event of the defendant's default;

(e) cl 7(i) provided that upon the fulfilment of the conditions precedent, the defendant shall immediately commence the earthworks and infrastructure works in respect of the land and complete all the same within 24 months after the unconditional date;

(f) cl 7(ii) provided that within 24 months after the unconditional date, the defendant shall complete the bungalows on the plaintiff's lots and deliver vacant possession of the same to the plaintiff, with the certificate of practical completion duly issued by the architect, and with water and electricity ready for connection;

(g) cl 7(iii) provided that within 30 months after the unconditional date, the defendant shall procure, obtain and deliver to the plaintiff, the certificates of completion and compliance in respect of the bungalows on the plaintiff's lots;

(h) cl 7(iv) provided that within 36 months from the unconditional date, the defendant shall complete the construction of the bungalow on the shared lot and to procure and obtain the certificate of completion and compliance in respect of the bungalow on the shared lot; and

(i) cl 10(vii) provided that the defendant shall comply with all the enforceable laws, rules and regulations regarding the implementation of the agreement and shall indemnify and keep indemnified the plaintiff from all summons, fines, penalties and compound caused by the defendant's non- compliance of the said laws, rules and regulations.

[5] The defendant proceeded with all the necessary works pertaining to the development and construction of the said land. At all relevant times, the plaintiff was represented by her husband. The said land was at all relevant times charged to Malayan Banking Bhd.

[6] The defendant, together with its team of professionals, then proceeded to liaise with the relevant authorities and agencies, such as Majlis Perbandaran Kajang, Pejabat Daerah/Tanah Hulu Langat, Jabatan Pengairan dan Saliran, SYABAS, lndah Water Konsortium Sdn Bhd, Agensi Perakuan Pembentungan Negeri Selangor, Tenaga Nasional Bhd and Telekom Malaysia Bhd.

[7] The planning permission and/or the development order was issued on 30 April 2013. The defendant obtained the approval for conversion of the said land to residential land and the subdivision of the land on 25 October 2013. Separate titles for the 14 lots were registered on 7 March 2014.

[8] Now it is noteworthy that the approval of the conversion and the subdivision was obtained after the conditional date had expired. The defendant claimed that the plaintiff had full knowledge of the same and never objected to it. Instead her husband (PW2) gave full cooperation to the defendant in order to obtain the approval.

[9] Be that as it may, on 13 February 2014, the plaintiff by letter gave notice to the defendant of their failure in meeting/fulfilling the conditions precedent within the time frame stipulated. After receipt of the plaintiff's letter, the defendant issued a letter dated 24 February 2014 to the plaintiff enclosing copies of one set of the building plans and site plan. The plaintiff claimed that the plans submitted and/or given to the plaintiff for her signature were incorrect and not in accordance with the specifications and/or terms agreed to by parties in the agreement.

[10] The defendant subsequently vide its letter dated 4 March 2014 acknowledged that there has been a delay in meeting/fulfilling the conditions precedent but went on explain that the delay was caused by a new ruling imposed by Majlis Perbandaran Kajang. The defendant, vide its letter dated 19 March 2014, sent to the plaintiff copies of the applications made by the defendant to the relevant authorities. The applications were made by the defendant notably after the expiry of the time stipulated in the agreement to fulfil the conditions precedent.

[11] Even so, it appeared that although the defendant had failed to fulfil the conditions precedent within the time frame stipulated, the plaintiff had admitted to granting to the defendant an extension of time of seven months from 11 September 2013–10 April 2014 to fulfil the conditions precedent. Despite the said extension, the defendant nevertheless failed to fulfil the conditions precedent.

[12] The plaintiff then, vide its former solicitor's letter dated 22 April 2014, gave notice to the defendant of its failure to meet/fulfil the time frame stipulated despite the extension of time of seven months from 11 September 2013. The plaintiff also informed the defendant that, on a without prejudice basis and for the benefit of the parties, the plaintiff is willing to grant a further extension of time of two months subject to new terms and conditions being agreed to.

[13] The defendant, however, vide its previous solicitor's letter dated 7 May 2014, informed the plaintiff that all works under the agreement shall be suspended until the plaintiff agrees to proceed with the terms and conditions of the initial agreement.

[14] On 30 May 2014, the plaintiff filed her action against the defendant and sought, inter alia, for the following reliefs:

(a) a declaration that the defendant had breached the terms of the agreement;

(b) a declaration that the plaintiff is entitled to terminate the agreement on the defendant's breach or alternatively that the agreement is terminated automatically;

(c) a declaration that the plaintiff is entitled to forfeit the deposit in the sum of RM200,000 on the defendant's breach;

(d) an order that the defendant hands over vacant possession of the land to the plaintiff forthwith; and

(e) special and general damages to be assessed.

[15] The defendant in turn filed a counterclaim seeking the following:

(a) a sum of RM9,276,767 being the costs expended by the defendant under the agreement; and

(b) general and special damages.

DECISION OF THE HIGH COURT

[16] After a trial which lasted a total of five days, the learned judge delivered his decision on 30 May 2015 where he dismissed the plaintiff's claim and allowed the defendant's counterclaim as follows:

(a) special damages in the sum of RM1,194,257.02;

(b) general damages in the sum of RM2,000,000;

(c) deposit in the sum of RM200,000 to be refunded to the defendant; and

(d) costs of RM30,000.

The learned judge also made an order that the vacant possession of the 14 lots be returned to the plaintiff.

[17] In essence, the learned judge found that the agreement was not automatically terminated due to the conduct of both parties. This is how the learned judge came to his finding:

> Saya putuskan bahawa kontrak tersebut tidak ditamatkan secara otomatik, berdasarkan tingkah laku yang ditunjukkan oleh kedua-dua pihak di dalam kes ini. Keterangan yang dikemukakan menunjukkan selepas tempoh tersebut tamat

plaintif secara positifnya masih membenarkan defendan meneruskan usaha mereka untuk mendapatkan kelulusan tersebut.

[18] The learned judge also found that it was the conduct of the plaintiff which had prevented the defendant from continuing with its work thereby unilaterally terminating the agreement. On this the learned judge observed:

Bagaimanapun kontrak ini ditamatkan kemudiannya disebabkan tingkah laku plaintif yang menghalang defendan meneruskan kerja-kerja mereka. Dengan yang demikian plaintif menunjukkan mereka sudah tidak mahu meneruskan kontrak tersebut dengan menghalang defendan dari meneruskan kerja-kerja mereka ... Oleh itu pada akhirnya kontrak ini telah ditamatkan oleh plaintif secara sebelah pihak pada ketika defendan bersedia melaksanakan tanggungan mereka. Oleh itu kontrak ini telah tamat di atas kesalahan plaintif.

OUR DECISION

[19] Aggrieved with the decision of the High Court, the plaintiff filed this appeal to this court. We are acutely aware that an appellate court should exercise restraint in reversing findings of fact made at first instance. Unless there is an obvious error, an appellate court would be slow to interfere.

[20] Nevertheless there are occasions when appellate interference is warranted and these occasions have been well set out in numerous cases. Some of these occasions are:

(a) where the trial judge took into account irrelevant considerations and failed to give due weight to relevant considerations (see *Director of Forests & Anor v Mau Kam Tong & Mau Kim Siong (the executors of the estate of Mau Ming, deceased) & Anor and another appeal* [2010] 3 MLJ 509);

(b) where there was no proper evaluation of the evidence by the trial judge (see *Lee Nyan Hon & Bros Sdn Bhd v Metro Charm Sdn Bhd* [2009] 6 MLJ 1);

(c) where the decision arrived at by the trial court was without judicial appreciation of the evidence (see *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1);

(d) where a trial court has so fundamentally misdirected itself, that no reasonable court which had properly directed itself and asked the correct questions, would have arrived at the same conclusion (see *Raja Lob Sharuddin bin Raja Ahmad Terzali & Ors v Sri Seltra Sendirian Bhd* [2008] 2 MLJ 87);

(e) where the trial judge was plainly wrong in arriving at his decision see *Lee Ing Chin @ Lee Teck Seng v Gan Yook Chin & Anor* [2003] 2 MLJ 97);

(f) where a trial judge had so manifestly failed to derive proper benefit from the undoubted advantage of seeing and hearing witnesses at the trial, and in reaching his conclusion, has not properly analysed the entirety of the evidence which was given before him (see *First Count Sdn Bhd v Wang Yew Logging & Plantation Sdn Bhd* [2013] 4 MLJ 693 which followed the Privy Council case of *Choo Kok Beng v Choo Kok Hoe & Ors* [1984] 2 MLJ 165); and

(g) where the judgment is based upon a wrong premise of fact or of law (see *Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd* [2012] 4 MLJ 149).

[21] In the instant appeal, the judgment of the learned trial judge was assailed on grounds, amongst others, that the learned judge had misapprehended the pleadings, had misdirected himself on the facts and the law when evaluating the facts and the evidence, had failed to appreciate and consider the evidence adduced by the parties and was plainly wrong in arriving at his decision.

[22] In this context, whether the learned judge was plainly wrong in arriving at his decision, would depend very much on the construction of cl 5 of the agreement. Clause 5 read as follows:

> Clause 5 — Conditions Precedent
>
> Within one (1) year from the date of this Agreement ('Conditional Period') unless the Parties mutually agree in writing to further extend the same, the Parties shall conduct the following:
>
> (i) the Company to obtain all the approvals, consents, permits and licences required and any other plans as may be required by the relevant authorities for the development of the Property including but not limited to the following:
>
> (a) Planning Permission, approving the draft layout plans attached hereto as Appendix 1;
>
> (b) Building Plan Approval for the 3 bungalow units identified as Lots No 1, 2 and 5 ('Landowner's Lots') approving the draft building plans attached hereto as Appendix 2 together with all other incidental approvals, including but not limited to the approval in respect of the Infrastructure;
>
> (c) the approval for the conversion of the entire Property from an agricultural land to residential land; and
>
> (d) the approval for the subdivision of the Property, (collectively, the 'Approvals') upon the terms and conditions which are satisfactory to the Landowner;
>
> (ii) the Landowner shall obtain the approval from the Chargee ('Chargee's Approval'); or in the event of the Landowner failing to obtain the Chargee's

Approval, then subject to the Approvals having been procured by the Company, the Landowner shall discharge the Charge in respect of the Property and redeem the Property from the Chargee at the Landowner's own costs and expenses.

For the purpose of the abovementioned item (ii), the Chargee's Approval shall mean the approval by the Chargee to the Landowner to apply for the subdivision etc and that after the issuance of the issue documents of title ('IDTs"), each IDT may be redeemed individually from the Chargee; and

(iii) subject to the aforesaid, the Company shall procure the issuance of IDTs for the Bungalow Lots,(collectively, 'Conditions Precedent"), failing which, this Agreement shall automatically be terminated and neither party shall have any claim against the other (save and except for any antecedent breach), and thereafter the Landowner shall be at liberty to deal with the Property in any manner whatsoever at its absolute discretion. In such event, the Earnest Payment referred to in Item 6 below shall be refunded to the Company.

Provided however the compliance of item 5(ii) may be waived by the Company and in such event the redemption sums shall be paid by the Company, and it shall be by way of advance and shall be recovered by the Company from the proceeds of the sale of the Shared Lot as provided herein.

The date when all the Conditions Precedent is fulfilled (or to the extent permitted under the law, waived) is hereinafter referred to as the 'Unconditional Date'.

[23] What stands out from this arrangement is the provision setting out the conditions precedent as well as the automatic termination provision which really forms the subject matter of the dispute and the instant appeal. The defendant contended that the plaintiff allowed time to be at large and acquiesced to the defendant's conduct. It was submitted that the plaintiff did not exercise her right under cl 5 to automatically terminate the agreement when the defendant failed to fulfil the conditions precedent. In fact, the plaintiff's husband (PW2) gave full cooperation to the defendant to get the approvals for conversion and subdivision of the land even though the conditional period had lapsed.

[24] Relying on the cases of *Sim Chio Huat v Wong Ted Fui* [1983] 1 MLJ 151, *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597; [2010] 1 CLJ 269 and *Hock Huat Iron Foundry (suing as a firm) v Naga Tembaga Sdn Bhd* [1999] 1 MLJ 65; [1999] 1 CLJ 89, the defendant submitted that time was no longer the essence of the agreement and the plaintiff was estopped from relying on the conditions precedent and the conditional period.

[25] It was further contended by the defendant that it had fulfilled its obligation under the agreement and the delay caused by the statutory requirements was beyond its control. Finally it was submitted that it was the

plaintiff who had breached the agreement by unilaterally varying the terms of the agreement which terms the defendant did not accept. As such, it was asserted that the defendant was entitled to the counterclaim as awarded by the trial judge.

[26] The plaintiff, on the other hand, contended that it was not disputed that the conditions precedent were not fulfilled within the time frame stipulated in the agreement. Even when the agreement was suspended by the defendant, the condition precedents remained unfulfilled. This much was conceded by the defendant's managing director (DW1) in his court testimony when he admitted all approvals to commence work had yet to be obtained.

[27] Now the effect of a failure to fulfil a condition precedent has been the subject of many case authorities. For the purpose of this appeal it will suffice to refer to the case of *Langkawi R & D Academy Sdn Bhd v Ketua Setiausaha, Kementerian Pertahanan Malaysia & Ors* [2012] 5 MLJ 662, where this court, through the judgment of Abdul Malik Ishak JCA, had occasion to observe as follows (at p 676):

> A contract is subject to a condition precedent when the contract is not binding unless or until a specified event occurs. Thus, where the condition is precedent, the agreement is not fully binding until the event occurs. The non-fulfilment of a condition precedent will result in the contract being discharged, either automatically or at the election of one of the parties.

[28] In the instant case, the parties had agreed that the conditions precedent as set out in the agreement had to be complied with within the time stipulated for the contract to remain valid and binding. Since there was failure to do so in this case, it must follow that the contract was automatically discharged. This crucial issue appeared to have been overlooked by the trial judge. It cannot also be the case that time was no longer of the essence and was at large as the time period itself was a condition precedent for the contract to be binding.

[29] In our view, it was also significant that failure to fulfil the conditions precedent would render the contract automatically terminated as stated in cl 5 of the agreement. The leading local authority on the applicability and effect of an automatic termination clause is the recent Federal Court case of *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441 ('Dream Property'). The dispute in that case revolved around the termination of a sale and purchase agreement ('SPA') for a parcel of land. There was a failure by the vendor to pay the balance of the purchase price within the stipulated time period. In the meantime, while the case was going on in the courts, the vendor had with permission entered possession and completed the construction of a commercial complex which then had ongoing businesses and tenants on the premises in question.

[30] One of the issues in the *Dream Property* case was the effect of cl 12 of the SPA which provided for the agreement to be treated as null and void and of no further effect if the balance of the purchase price was not paid within the stipulated time period. On this issue the Federal Court, through the judgment of Azahar Mohamed FCJ, stated (at p 469):

> In our view, whether or not a clause in an agreement has the effect of providing for automatic termination and confers on a party a right to immediate termination, must be considered by the words used by the parties in the particular agreement and this will depend very much on the circumstances of each individual case. In the present case, however, what stands out is that on a matter of substance, cl 12 expressly provides that 'the contract shall be treated as null and void and of no further effect'. The contractual language is clear and plain enough. That explicit and unambiguous words must be given its literal meaning. The immediate consequence of the termination compellingly favours the view that automatic termination was intended by the plaintiff and the defendant when they mutually agreed to be bound by the SPA. In our view, cl 12, as a contractual term explicitly agreed between the plaintiff and the defendant, provides for the automatic termination of the SPA upon the defendant's failure to pay the balance purchase price within the stipulated time period. In such a situation, there was no requirement for a notice of termination to be issued by the plaintiff to the defendant.

[31] Reverting to the instant appeal, in view of the automatic termination clause set out in cl 5 of the agreement, there was no longer any requirement of any notice of termination. Once the conditions precedent were not fulfilled within the stipulated period or any agreed extended period, the agreement would automatically come to an end. So when the plaintiff's solicitors sent the letter of 22 April 2014 giving notice that the conditions precedent were not complied with and offering a further extension with new conditions which was not accepted by the defendant, the contract came to an end there and then by virtue of cl 5 of the agreement. There was no ambiguity in what the parties signed up for. The court is then duty bound to uphold what the parties had bargained for in the agreement and more particularly cl 5.

[32] In our view, the learned judge fell into error when he found that time was no longer of the essence and was indeed at large. The correct position was that once the conditions precedent were not fulfilled within the stipulated period, the contract became null and void and the parties were then relieved from performing the rest of the obligations. At the risk of repetition, contrary to the finding by the learned judge, there was no breach by the plaintiff. It was the defendant who had failed to fulfil its promise to obtain all the approvals as stated in cl 5, which were stipulated to be the conditions precedent which were to be performed by the unconditional date which included any agreed period of extension.

[33] In the circumstances, and with respect, the learned judge had failed to

apply the trite principles of law relating to an automatic termination clause thus resulting in a fundamental misdirection. The learned judge's finding that the automatic termination clause did not apply was plainly erroneous in the face of overwhelming evidence which indicated otherwise. This failure warranted appellate interference in favour of the plaintiff.

CONCLUSION

[34] In the circumstances, and for the reasons we have given, we are of the view that the decision of the High Court was plainly wrong. Accordingly, we allowed the appeal and set aside the order of the High Court. In substitution we allowed the declaration sought by the plaintiff/appellant that the agreement was automatically terminated with the result that the deposit of RM200,000 was to be refunded to the defendant/respondent. The counterclaim was without merit and was dismissed. There would also be an order, which was also ordered by the High Court, that the defendant/respondent hands over vacant possession of the said land to the plaintiff/appellant forthwith. Lastly, the defendant/respondent to pay to the plaintiff/appellant costs here and below in the sum of RM40,000 subject to payment of allocator fees and deposit to be refunded to the plaintiff/appellant.

Appeal allowed.

Reported by Ashok Kumar